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No. 80-1302

In the Supreme Court of the United States

OCTOBER TERM, 1980

EARL DAVID SHAFFER,
Petitioner,

VERSUS

DAVID M. COOK, LARRY D. LAHMAN,
and STEPHEN JONES,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONSE OF RESPONDENT LARRY D. LAHMAN IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Attorney for Respondent
Larry D. Lahman

April, 1981

QUESTION PRESENTED

Did the United States Court of Appeals for the Tenth Circuit err in affirming the Order of the United States District Court for the Western District of Oklahoma which dismissed petitioner's action against respondent Larry D. Lahman for failure to state a claim upon which relief could be granted?

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Respondent Larry D. Lahman, by and through his attorney, Elliott C. Fenton, respectfully prays this Court to affirm the decision rendered by the United States Court of Appeals for the Tenth Circuit in *Shaffer* v. *Cook*, 634 F.2d 1259 (10th Cir. 1980).

STATEMENT OF THE CASE

Petitioner filed an action in the United States District Court for the Western District of Oklahoma, No. CIV-79-805E, against David M. Cook, Larry D. Lahman, and Stephen S. Jones. It is alleged in the Second Amended Complaint that Jones was an attorney who formerly represented petitioner in a divorce action, that petitioner had sued Jones in the State District Court in Oklahoma County, Oklahoma, and that Lahman represented Jones in that ac-

tion and that Cook was the judge. It is alleged that all respondents conspired to defraud the petitioner and to deny him equal protection of the laws and due process of law (p. 3, Second Amended Complaint).

In his Second Amended Complaint petitioner states that Lahman was a party to the alleged fraud and conspiracy in the following particulars:

"(a) There were obvious contacts between Judge Cook and Lahman before each hearing in the state court case because Shaffer saw Lahman in Judge Cook's chamber hallway before each hearing. (Paragraph II Second Amended Complaint.)

"(b) Judge Cook would 'openly in court further conspire with LARRY D. LAHMAN'; Judge Cook visibly and orally exhibited his 'demeanor' toward Shaffer; that Judge Cook had no intention of being fair and impartial; and that Judge Cook stated that he wished that he could dismiss the case with prejudice. (Paragraph II Second Amended Complaint.)

"(c) That Lahman caused fraud upon Shaffer in the state court case by mailing to Shaffer an instrument showing a Certificate of Service on February 14, 1977, but which Shaffer did not receive until February 18, 1977, with a postmark of February 17, 1977. (Paragraph III Second Amended Complaint.)

"(d) Lahman made false and fraudulent statements about a conspiracy alleged by Shaffer in the state court case, and that this resulted in Judge Cook entering an Order striking conspiracy from plaintiff's state court petition. (Paragraph IV Second Amended Complaint.)

"(e) Judge Cook refused to disqualify himself upon request but continued to conspire with Lahman to deny Shaffer a fair trial, due process of law and equal protection of the law. (Paragraph IV Second Amended Complaint.)

"(f) Judge Cook entered an Order October 28, 1977, dismissing Shaffer's state court action. This alleged fraudulent action was discussed and agreed to in open court by Judge Cook and Lahman."

The District Court sustained Motion to Dismiss of Respondent Lahman and the United States Court of Appeals for the Tenth Circuit affirmed in *Shaffer* v. *Cook,* 634 F.2d 1259 (10th Cir. 1980).

ARGUMENT

Petitioner seeks to recover judgment against respondent Lahman for alleged violations of 42 U.S.C. 1983 which provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The acts of a private individual such as Lahman can constitute acts done under color of state law as required under 42 U.S.C. 1983 if there is joint activity or a conspiracy between the private individual and a state official

acting within the authority of his office. *Norton* v. *Liddel,* 620 F.2d 1375 (10th Cir. 1980).

For the reasons stated in the Response Brief of David M. Cook there is absolute immunity for respondent Cook on account of his conduct as a judge.

A careful analysis of the conduct of Lahman as specified by petitioner reveals that there is no joint activity or conspiracy involving Cook and Lahman. Therefore, the District Court was correct in holding that petitioner failed to state a claim upon which relief may be granted.

An excellent example of the same problem presented by the instant case is found in *Slotnick* v. *Staviskey,* 560 F.2d 31 (1st Cir. 1977). There, as here, plaintiff represented himself.

There were general allegations of a conspiracy but only one specific allegation, which the Court deemed insufficient.

The Court stated at page 33:

> "In an effort to control frivolous conspiracy suits under §1983, federal courts have come to insist that the complaint state with specificity the facts that, in the plaintiff's mind, show the existence and scope of the alleged conspiracy. It has long been the law in this and other circuits that complaints cannot survive a motion to dismiss if they contain conclusory allegations of conspiracy but do not support their claims with references to material facts." (Citations omitted)

In the case at bar, petitioner states six specific allegations purporting to show fraud or conspiracy involving

respondent Lahman. All but one occurred in open court consisting of arguments made by Lahman or his conduct. Typical is the allegation that petitioner saw Lahman in Judge Cook's chamber hallway before each hearing. There is certainly nothing sinister about a lawyer being outside a judge's chambers before a hearing or even in speaking to the judge. This allegation does not even rise to the dignity of an allegation of conspiracy. The conduct outside the courtroom involves the allegation that Lahman was guilty of fraud because he mailed petitioner an instrument showing a date of service with a postmark three days later and received by petitioner the following day. No attempt is made to show that there was any improper conduct on the part of Lahman or that any prejudice resulted to anyone.

The conclusion is inescapable that the petitioner failed to make specific allegations of conspiracy.

Petitioner also alleges a violation of his civil rights under the provisions of 42 U.S.C. 1985 and 1986. As stated by the Court of Appeals in *Shaffer* v. *Cook,* supra, these claims were properly dismissed because of petitioner's failure to allege any "invidiously discriminatory motivation" on the part of respondents.

CONCLUSION

WHEREFORE, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Larry D. Lahman

April, 1981

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Response of Respondent Larry D. Lahman in Opposition to Petition for Writ of Certiorari were mailed to the persons listed below on the ..... day of April, 1981, by placing the same in the U. S. Mail with postage fully prepaid.

All parties required to be served have been served.

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